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SMARTFRAME SDN BHD

v.

ANJUNG BAHASA SDN BHD

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HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[COMPANIES WINDING-UP PETITION NO: D1-28-839-2007]
30 SEPTEMBER 2008

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COMPANY LAW: *Winding-up - Petition - Intitulement merely stated "In the matter of Section 218 of the Companies Act 1965" - Whether sufficiently particularised - Whether paragraph(s)/limb(s) to be specified - Whether petition fundamentally flawed warranting dismissal - Companies (Winding-Up) Rules 1972, rr. 8, 22 - Companies Act 1965, s. 218(1)*

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Before the hearing of the petition herein on its merits, the respondent raised a preliminary objection, *ie*, that the petition was fatally defective as the intitulement to the petition merely stated "In the matter of s. 218 of the Companies Act 1965". As such, the respondent submitted that the intitulement was not sufficiently particularised. On the other hand, the petitioner submitted that the intitulement was drafted in compliance with the statutory format as prescribed by rr. 8(1) and 22 of the Companies (Winding-Up) Rules 1972 ('the Rules'). There was no requirement that the petitioner must specify the particular paragraph/limb of subsection (1) of s. 218 of the Companies Act 1965 ('the Act'). Further, the Atkin's Court Forms Malaysia did not require a petitioner to state the relevant subsection of the Act – only the specific section of the Act need be stated. Also, the petitioner was relying on s. 218(1)(e) and not on s. 218(1)(i) of the Companies Act 1965 as led by para 9 of the petition. As such, the respondent was not misled or prejudiced by the petition. Further, the respondent waived its right to raise the preliminary objection by filing two affidavits in opposing the petition.

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Held (allowing the respondent's preliminary objection):

(1) A petitioner must state in the intitulement of his petition the precise grounds of his petition. He must specify the particular paragraph(s)/limb(s) of subsection (1) of s. 218 upon which his petition is based. He must not be vague, ambiguous or inconsistent as to his grounds. It does not suffice for him to

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merely mention 's. 218' of the Companies Act, without specifying the paragraph/limb that he has in mind as being the basis of his petition. That would not be fair to the respondent who intends to oppose the petition. The respondent or the court cannot be expected to merely speculate, by reading the petition as to which paragraph(s)/limb(s) of subsection (1) of s. 218 the petitioner is relying. It would be unjust to the respondent to expect him to prepare his defence merely by guessing or speculating. It followed that failure to specify the relevant para(s)/limb(s) of s. 218(1) was a fundamental defect that warranted a dismissal of the petition. (paras 21 & 22)

(2) The phrase "... with any necessary additions ..." in r. 8 and "... with such variations as circumstances may require ..." in r. 22 of the Rules, in fact, implied that the intitulement in the petition must particularise the precise ground(s). Nor must the word "section" as found in the phrase "(state section number)" in the Atkin's Court Forms Malaysia be given too literal an interpretation. An intitulement in a petition (or other originating process) is not required by the rules of procedure merely to adorn the petition (or the originating process in question). It is prescribed to be there to serve a purpose – to give sufficient notice to the party on whom the petition (or the originating process) is intended to be served as to what the petition (or the originating process) is all about. Hence, it could not be vague or general in nature. (para 23)

(3) The fact that the respondent filed two affidavits in opposing the petition was not deemed a waiver of its right to raise the preliminary objection. The petition was fundamentally flawed and as such the principle of waiver was inapplicable. (para 24)

Case(s) referred to:

Cheow Chew Khoon v. Abdul Johari Abdul Rahman [1995] 4 CLJ 127 CA ***(refd)***

Kok Fook Sang v. Juta Vila (M) Sdn Bhd & Ors [1997] 2 CLJ 116 CA ***(refd)***

Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd [2006] 2 MLJ 653 ***(dist)***

Wong Thai Kuai & Anor v. Kansas Corporation Sdn Bhd [2007] 3 CLJ 263 HC ***(refd)***

Legislation referred to:

Companies Act 1965, s. 218(1)(e), (i)

Companies (Winding-Up) Rules 1972, rr. 8(1), 22

For the petitioner - Ashok Kumar (Lam Wai Loon with him); M/s Skrine
For the respondent - Malik Imtiaz (Cik Chanra with him); M/s Manjeet Kaur & Assoc
For the Director General of Insolvency - Cik Natrah

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus J:

[1] In the present case the following are the undisputed material facts. The respondent had engaged a company, Visage Engineering Sdn Bhd ('Visage Engineering'), a turn-key contractor, for the construction of an office complex for Dewan Bahasa and Pustaka. Visage Engineering, in turn, sub-contracted to the petitioner a part of the project concerning design and construction works. The respondent provided the petitioner an irrevocable guarantee to secure payments due from Visage Engineering to the petitioner under the subcontract. In 2002 a dispute arose between the petitioner and Visage Engineering over the petitioner's claim under the subcontract of a sum of RM2,699,033.47 ('the disputed sum'). Visage Engineering disputed the claim of the petitioner and this resulted in arbitration proceedings between the former and the latter. The arbitration proceedings commenced in February 2003 and concluded on 6 February 2006. An award was given in favour of the petitioner by the arbitrator. Visage Engineering, dissatisfied with the decision of the arbitrator, applied on 21 March 2006 to set aside the award in the Kuala Lumpur High Court (Special Powers and Appellate Division) *via* Originating Motion R2-25-68-06 ('the setting aside proceedings'); whilst the petitioner, on their part, applied on 28 February 2006 for leave to enforce the award in the Kuala Lumpur High Court (Special Powers and Appellate Division) *via* Originating Summons R2-24-21-06. Both actions are as yet to be determined.

[2] Now, meanwhile, in June 2004, while the arbitration proceedings were still ongoing, the petitioner made a demand on the respondent, as the guarantor, for the payment of the disputed sum. The respondent refused to accede to the demand, taking the position that it was under no obligation to pay in light of the ongoing dispute and court proceedings between Visage Engineering

and the petitioner. The petitioner then commenced a writ action against the respondent for the disputed sum in the Kuala Lumpur High Court (Commercial Division) *via* Civil Suit No. D8-22-1313-2004 ('the D8 suit'); and applied for an O. 14 summary judgment.

[3] On 17 February 2006, the senior assistant registrar of the High Court, in the D8 suit, entered summary judgment in respect of the disputed sum in favour of the petitioner. This decision was affirmed on appeal by the judge in chambers on 27 February 2007. Dissatisfied with the decision of the learned judge, the respondent appealed to the Court of Appeal on 28 February 2007. Pending the determination of the said appeal, the Court of Appeal granted the respondent a stay of execution on condition that the respondent furnished a bank guarantee in the amount of the disputed sum to secure the said sum. The respondent duly complied with the condition imposed. The Court of Appeal, however, subsequently, having heard the appeal, dismissed the respondent's appeal on 3 September 2007. Leave to appeal was refused by the Federal Court on 14 January 2008.

While the leave application to the Federal Court was still pending, the following happened. On 31 October 2007 the petitioner issued to the respondent a statutory notice 'pursuant to s. 218' of the Companies Act for the summary judgment sum with interest and costs ('the s. 218 notice'). The respondent replied vide its solicitors' letter of 19 November 2007 taking the following positions:

(a) that the respondent was not commercially insolvent as was evident from its ability to furnish the bank guarantee at the direction of the Court of Appeal (for the purposes of the stay of execution);

(b) that the respondent had in any event paid the sum equivalent to the sum demanded in the s. 218 notice into the respondent's solicitors account to secure the same with instruction to release the same in the event the Federal Court proceedings terminated in favour of the petitioner; and

(c) that the payment of the said sum to the petitioner would only be made if the petitioner's directors were to furnish a guarantee to the effect that the said sum would be refunded to the respondent by the petitioner in the event that Visage Engineering succeeds in its setting aside proceedings.

[4] The petitioner did not respond to the respondent's solicitors' letter. Instead, they proceeded to file the present petition on 27 November 2007.

[5] In the meantime, on 26 November 2007 the respondent commenced proceedings against the petitioner in the Kuala Lumpur High Court (Commercial Division) *via* Originating Summons D1-24-354-2007 ('the D1 action') in which the respondent contends that the issuance of the s. 218 notice was an abuse of process. But this court dismissed the action on the basis that there was no abuse of process as the judgment was enforceable in the absence of an order for stay of execution.

[6] At the commencement of the hearing of the present petition, the learned counsel for the respondent, Encik Malik Imtiaz, raised a preliminary objection. Notice of this preliminary objection had been served to the petitioner's solicitors on 27 February 2008. The preliminary objection is that the petition is fatally defective in that the intitulement to the petition merely states that the petition is:

> In the matter of Section 218 of the Companies Act, 1965.

[7] Counsel for the respondent submitted that, in law, this is not a sufficient particularization of the intitulement.

[8] In order to fully appreciate this argument, I think it is necessary for me to set out in full the provisions of s. 218(1) of the Companies Act. This subsection states:

> **218. Circumstances in which company may be wound up by Court.**
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> (1) The Court may order the winding up if:
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> (a) the company has by special resolution resolved that it be wound up by the Court;
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> (b) default is made by the company in lodging the statutory report or in holding the statutory meeting;
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> (c) the company does not commence business within a year from its incorporation or suspends its business for a whole year;
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> (d) the number of members is reduced in the case of a company (other than a company the whole of the issued shares in which are held by a holding company) below two;

(e) the company is unable to pay its debt;

(f) the directors have acted in the affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever which appears to be unfair or unjust to other members;

(g) an inspector appointed under Part IX has reported that he is of opinion:

(i) that the company cannot pay its debts and should be wound up; or

(ii) that it is in the interests of the public or of the shareholders or of the creditors that the company should be wound up;

(h) when the period, if any, fixed for the duration of the company by the memorandum or articles expires or the event, if any, occurs on the occurrence of which the memorandum or article provide that the company is to be dissolved;

(i) the Court is of opinion that it is just and equitable that the company be wound up;

(j) the company has held a licence under the Banking and Financial Institutions Act 1989 or the Islamic Banking Act 1983, and that licence has been revoked or surrendered;

(k) the company has carried on Islamic banking business, licensed business, or scheduled business, or it has accepted, received or taken deposits in Malaysia, in contravention of the Islamic Banking Act 1983 or the Banking and Financial Institutions Act 1989, as the case may be;

(l) the company has held a licence under the Insurance Act 1996 and:

(i) that licence has been revoked;

(ii) Bank Negara Malaysia has petitioned for its winding up under subsection 58(4) of the Insurance Act 1996; or

(iii) an order under paragraph 59(4)(b) of the Insurance Act 1996 has been made in respect of it;

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(m) the company is being used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia; or

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(n) the company is being used for any purpose prejudicial to national security or public interest.

[9] It is to be appreciated that the above subsection (1) of s. 218 prescribes at least 17 possible grounds that may be invoked by a petitioner, depending on the circumstances of the case. Encik C Malik's contention is that the petition must state the particular paragraph (or paragraphs) of the above subsection on which the petition is based. Counsel argued that although the Companies Act and the Companies (Winding-Up) Rules 1972 are silent on the need to particularize, nevertheless, a petition is for all intents D and purpose a 'pleading', and hence the requirements of sufficient particularization equally apply to petitions as they would to other originating processes or other pleadings. He submitted that neither the court nor the respondent to a petition should be made to speculate as to the nature of the case that has been brought E merely by perusing the content of the petition itself; instead, it is for the petitioner to state the nature of his case clearly by pleading with sufficient particularity and clarity the key aspects of the claim in the intitulement. He referred to *Cheow Chew Khoon (t/a Cathay Hotel) v. Abdul Johari bin Abdul Rahman* [1995] 4 CLJ F 127 where Gopal Sri Ram JCA, in delivering the judgment of the Court of Appeal, said (at p. 142):

> The summons does not, as I observed very early in this judgment, state any particular Rule of Court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. G How, might one ask, is a defendant or the Court to determine which Rule of Court the plaintiff is involving unless he explicitly specifies it? If a defendant and the Court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being H invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation.

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> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the Court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of Court under which the Court is being moved, otherwise it would be an embarrassing pleading and liable to be struck out, unless sooner amended.

[10] Encik Malik further submitted that the intitulement of a petition, just as in the case of other originating processes, is aimed at informing with clarity the respondent to the petition the nature of the case that is being brought against him. Learned counsel cited the Court of Appeal case of *Kok Fook Sang v. Juta Vila (M) Sdn. Bhd. & Ors* [1997] 2 CLJ 116 where Mahadev Shankar JCA, in delivering the judgment of the court, said (at p. 125):

> Kok Fook Sang ('Kok') filed his petition on 21 September 1995. The heading indicates this to be a petition under s. 218(1) of the Act. This subsection contains 11 separate and independent grounds why a winding-up order may be made. It is incumbent upon a petitioner to state which of these grounds he is relying upon and not ask the Court to search his petition for facts which may be thought capable of being slotted into some particular sub-section.

[11] Another case referred to by learned counsel for the respondent is *Wong Thai Kuai & Anor v. Kansas Corporation Sdn Bhd* [2007] 3 CLJ 263. In this case cited, Ramly Ali J said (at p. 269-270):

> Similarly in the present case before this court, the petitioner had also failed to identify with clarity under which subsection of the said Act, the petition was presented. Hence this court is of the view that from the principles of law laid down, the present petition ought to be struck out for want of compliance. The strict compliance of the law in the Companies Act 1965, especially when one intends to wind up the company is analogous to 'an accused person standing for a murder trial, whereby the benefit of the doubt must always be given to the accused.

[12] In the context of the issue raised, learned counsel for the respondent also brought to the court's attention that the petition itself has been pleaded inconsistently or ambiguously. On the one hand there is para 9 of the petition that states that 'The company is insolvent and unable to pay its debts', suggesting a reference to s. 218(1)(e) of the Companies Act; yet on the other hand, there

A is para 10 that states that 'In the circumstances, it is just and equitable that the company should be wound up' suggesting a reference to s. 218(1)(i) of the same Act. Counsel submitted that such an inconsistency or ambiguity had prejudiced the respondent.

B **[13]** Encik Malik, based on the above arguments, urged the court to dismiss the petition with costs.

[14] The learned counsel for the petitioner, Encik Ashok Kumar, on the other hand, in reply to the respondent's preliminary objection, submitted that the respondent's argument, that the
C intitulement in the petition lacks particularity, is baseless. Counsel submitted that the intitulement had been drafted in compliance with the statutory format as prescribed by rr. 8(1) and 22 of the Companies (Winding Up) Rules 1972 ('the Winding Up Rules'). Encik Kumar argued that there is no requirement in the Winding
D Up Rules that the petitioner, in the intitulement of his petition, must specify the particular paragraph/limb of subsection (1) of s. 218 of the Act that is relied upon as a ground for applying to winding up the respondent. Counsel pointed out that r. 8 of the Winding Up Rules merely requires that:

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8. Title of Proceedings

(1) Every proceeding in a winding-up matter shall be dated and shall, with any necessary additions, be intituled as follows:

F IN THE HIGH COURT IN ... AT ...

COMPANIES (WINDING-UP) NO ... OF ...

In the matter of the Companies Act, 1965

G and

In the matter of ...

[15] Counsel emphasized the words:

H In the matter of the Companies Act, 1965

and argued that on the part of the petitioner there had been due compliance with the requirement of sub-rule (1) of r. 8 of the Winding Up Rules.

I **[16]** Rule 22 of the Winding-Up Rules prescribes:

22. Form of Petition

Every petition for the winding-up of a company by the Court may be in Form 2 or 3 with such variations as circumstances may require.

[17] Encik Ashok Kumar further submitted that in the *Atkin's Court Forms Malaysia in Civil Proceeding,* vol. 6, the heading for a winding up petition is prescribed as follows:

In the Matter of the Companies Act 1965

And in the Matter of (state section number) of the Companies Act 1965

And in the Matter of ABC Sdn Bhd

[18] Counsel submitted that *Atkin's Court Forms Malaysia* does not require a petitioner to state the relevant subsection of the Companies Act: only the specific section of the Act needs to be stated; and that in the present case the petition had been duly intituled with the relevant section of the Companies Act, namely, s. 218. Encik Kumar argued that the respondent's contention that the petition should be struck out for want of compliance was untenable.

[19] The learned counsel for the petitioner clarified that the petitioner in its petition was relying on s. 218(1)(e) and not on s. 218(1)(i). Encik Kumar argued that this was made clear by para 9 of the petition and that the respondent was not misled or prejudiced by the petition.

[20] Counsel for the petitioner further submitted that the respondent in any case had waived its right to raise the preliminary objection by filing two affidavits opposing the petition. He referred to *Multimedia Development Corp Sdn Bhd v. Pembinaan Purcon Sdn Bhd* [2006] 2 MLJ 653 where Abdul Malik Ishak J (as he then was) said (at p. 662):

MDC maintained and I agreed with the arguments that the error in the intitulement was unlikely to mislead or cause any prejudice or embarrassment to Purcon. In my judgment, Purcon had taken the necessary steps to contest the suit by filing its affidavits in opposition and, consequently, Purcon must be taken to have waived their objections to the intitulement. It was also part and

parcel of my judgment that Purcon had taken a step in the proceedings and it must be deemed to have waived the preliminary objections on procedural non-compliance. Furthermore, whatever non-compliance complained of by Purcon, it amounted, at best, to a breach of procedural requirement. It was not of such gravity as to warrant a sanction by this Court by denying MDC the reliefs which it sought. There was, in my judgment, no injustice occasioned to Purcon by reason of the procedural breach.

[21] It is my judgment in the present case that based on the authorities a petitioner must state in the intitulement of his petition the precise grounds of his petition. This means he must specify the particular paragraph/limb (or paragraphs/limbs, if there is more than one ground) of subsection (1) of s. 218 upon which his petition is based. He must not be vague, ambiguous or inconsistent as to his grounds. In other words, it does not suffice for him to merely mention 's. 218' of the Companies Act, without specifying the paragraph/limb that he has in mind as being the basis of his petition. That would not be fair to the respondent who intends to oppose the petition. The respondent (or the court) cannot be expected to merely speculate, by reading the petition, as to which paragraph/limb of subsection (1) of s. 218 the petitioner is relying. It would be unjust to the respondent to expect him to prepare his defence merely by guessing or speculating.

[22] I accept the respondent's counsel's submission that failing to specify as to under which paragraph (or paragraphs)/limb (or limbs) of s. 218(1) the petition is grounded is a fundamental defect that warrants a dismissal of the petition.

[23] With respect, it is my view that rr. 8 and 22 of the Winding-Up Rules do not support the petitioner's argument. One cannot just gloss over the words:

> with any necessary additions

as found in r. 8(1); or the words:

> with such variations as circumstances may require

appearing in r. 22, in interpreting these rules. In my opinion, these phrases imply that the intitulement in the petition must particularize the precise ground (or grounds). Nor must the word 'section' as found in the phrase '(state section number)' in the *Atkin's Court Forms* be given too literal an interpretation. An

intitulement in a petition (or other originating process) is not required by the rules of procedure merely to adorn the petition (or the originating process in question): it is prescribed to be there to serve a purpose – to give sufficient notice to the party on whom the petition (or the originating process) is intended to be served as to what the petition (or the originating process) is all about; hence it cannot be vague or general in nature.

[24] With respect, I am unable to accept Encik Kumar's argument that since the respondent had filed two affidavits opposing the petition the respondent are therefore deemed to have waived their right from raising the preliminary objection. I so rule because in the present case the petition is fundamentally flawed. In such a situation, the principle of waiver, to my mind, is inapplicable. The judgment of Abdul Malik Ishak J in *Multimedia Development Corporation* is irrelevant as the facts of that case are different. In that case the defect was of a different nature and does not involve a failure to specify in the intitulement of the petition the particular paragraph under s. 218(1) of the Companies Act on which the petition was based. In fact there it is not a case of a winding-up petition. Moreover, in that case the learned Judge had made a finding that the breach of procedure was not of a serious nature.

[25] In the light of my ruling on the preliminary objection, which results in a dismissal of the petition with costs, it is now no longer necessary for me to dwell on the merits of the petition.